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No. 82-1076

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF LOUISIANA, TEXACO INC. and
THE LOUISIANA LAND AND EXPLORATION COMPANY,
Petitioners,

v.

DEPARTMENT OF ENERGY and
DONALD P. HODEL, Secretary of Energy,
Respondents.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

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February 17, 1983

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SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

Pursuant to Rule 22.6 of the Rules of this Court, petitioners the State of Louisiana, Texaco Inc. and The Louisiana Land And Exploration Company submit this supplemental brief for the purpose of bringing to this Court's attention a new case not available at the time that petitioners filed their Petition For A Writ Of Certiorari on December 23, 1982. That decision, *Grigsby v. Dep't of Energy*, No. 5-81 (Temp. Emer. Ct. App.) (hereinafter "*Grigsby II*"), was decided by the Temporary Emergency Court of Appeals (hereinafter "TECA")

on January 18, 1983.[1] *Grigsby II* is TECA's decision on appeal from the decision of the trial court following TECA's remand of *Grigsby v. Dep't of Energy*, 585 F.2d 1069, *modified on rehearing*, 585 F.2d 1080 (Temp. Emer. Ct. App. 1978), *cert. denied*, 440 U.S. 908 (1979) (hereinafter "*Grigsby I*"), a case upon which petitioners principally rely in their Petition.

STATEMENT

In their Petition, petitioners have urged this Court to review the decision below because TECA, in rendering that decision, abrogated its duty to provide "consistency of decision" with respect to the meaning of "property," the most fundamental concept of an important federal regulatory system. Petition at 18-22. *Grigsby II* further highlights the inconsistency that has characterized TECA's decisions concerning that concept.

In *Grigsby I*, TECA held that an order of the Louisiana Office of Conservation establishing a crude oil production unit gave rise to the "right to produce" and thus created a "property." *See* Petition at 19. Thereafter, in *Pennzoil Co. v. Dep't of Energy*, 680 F.2d 156 (Temp. Emer. Ct. App. 1982), TECA reaffirmed the interpretation of "property" announced in *Grigsby I* that "'[t]he focus of the "property" definition is upon the "right to produce," not the fee or leasehold nature of the ownership interest.'" *See* Petition at 20. However, in the decision below, TECA upheld as "reasonable" the Department of Energy's "general position that the lease [not other 'rights to produce'] defines the property" and ignored its earlier recognition of the conclusive effect of orders of the Louisiana Office of Conservation in determining "properties" in Louisiana.

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[1] The full text of TECA's decision in *Grigsby II* is set out at Appendix A hereto.

TECA's decision in *Grigsby II* underscores the confusion created by its decision below. Without mentioning its decision in the instant case, TECA reaffirmed its holding in *Grigsby I* that the order of the Louisiana Office of Conservation that established the unit there at issue created a "property":

> On rehearing, this Court held that production from Robert Leger Well No. 1 was entitled to be treated as "new" oil, on and after June 24, 1976. This result followed from the fact that official recognition and unitization as of that date by the Louisiana Office of Conservation (LOC) . . . . brought it within DOE's then definition of "separate property."
>
> • • • •
>
> [W]e believe the holdings in *Grigsby I* were and remain correct. The prior opinion . . . held that DOE was presumptively entitled to rely on earlier unit classifications by the regulating state, even if those classifications were erroneous in fact.

App. A. at 3a. The court did not attempt to distinguish the decision below.

TECA's decision in *Grigsby II* confirms that "property" designations could properly be based on "unit classifications by the regulating state . . . ." In that case, as in this, the state concerned was Louisiana. App. A. at 2a. The decision below cannot be reconciled in principle with either this latest decision of TECA or with that court's earlier decisions in *Grigsby I* and *Pennzoil Co.*

The conflict between the decision below and TECA's other three decisions as to the meaning of "property" has created confusion and uncertainty on this important question of federal law. This Court should review TECA's failure to provide on that question the "consistency of decision" for which that court was established.

CONCLUSION

For the foregoing reasons, and for those set forth in their Petition, petitioners respectfully request that the writ of certiorari be allowed.

Respectfully submitted,

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February 17, 1983

APPENDIX

TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

No. 5-81

JACK W. GRIGSBY,
Plaintiff-Appellant,

vs.

DEPARTMENT OF ENERGY and JAMES EDWARDS,
Secretary of Energy,
Defendants-Appellees,

and

THE UNITED STATES OF AMERICA,
Counterclaimant-Appellee.

On Appeal from The United States District Court
Western District of Louisiana
(Civil Action No. 770258-S)

Argued: January 7, 1983 Decided: January 18, 1983

H. H. HILLYER, JR., with whom J. Henry Phillips III of the same firm, Milling, Benson, Woodward, Hillyer, Pierson & Miller, New Orleans, Louisiana; and Marlin Risinger, Jr. and W. Michael Adams, of the firm, Blanchard, Walker, O'Quin & Roberts, Shreveport, Louisiana, of counsel, were on the brief for the Appellant.

BARBARA WARD, Department of Justice, Washington, D.C., with whom J. Paul McGrath, Assistant Attorney General, and Dennis G. Linder of the same agency; and Daniel F. Shea and Larry Ellsworth, of Counsel, Department of Energy, Washington, D.C., were on the brief for the Appellees.

Before BROWN, HEMPHILL and POINTER, Judges.

PER CURIAM:

This case has been before this Court on appeal once before in *Grigsby v. DOE*, 585 F.2d 1069, opinion on rehearing at 585 F.2d 1080 (TECA 1978), which will be referred hereafter as *Grigsby I*. The salient facts are stated there and need not be repeated. On rehearing, this Court held that the production from Robert Leger Well No. 1 was entitled to be treated as "new" oil, on and after June 24, 1976. This result followed from the fact that official recognition and unitization as of that date by the Louisiana Office of Conservation (LOC) of the Upper Heywood "A" Sand, Reservoir A, Sand Unit B (Upper Heywood), as a unit separate from the Heywood Sand, Reservoir A, Sand Unit B (Heywood), brought it within DOE's then definition of "separate property." However, the matter was remanded to the trial court for trial on a disputed material factual issue. That issue was whether the Upper Heywood A reservoir had been treated as part of the same unit which covered the Heywood reservoir prior to June 24, 1976, or whether it had been treated as a separate unit before that date. On remand, appellant was unable to carry his burden to show separate unit treatment of the Upper Heywood Reservoir A, as found by the district court. Consequently, the Robert Leger Well No. 1 production before June 24, 1976 should have been priced as "old" oil by appellant.

A close examination of this appeal reveals that appellant does not seek review of any error made by the district court except insofar as the district court complied with this Court's directions on remand. Appellant actually seeks review of the decision by this Court in *Grigsby I*, claiming that the instructions therein to the trial court were erroneous. The prior holdings of this Court are the law of this case, and were properly followed by the district court.

More importantly, we believe the holdings in *Grigsby I* were and remain correct. The prior opinion stated that the need for certainty and finality in the enforcement of price control regulations militated against retroactive application of the LOC's subsequent separate unitization and held that DOE was presumptively entitled to rely on earlier unit classifications by the regulating state, even if those classifications were erroneous in fact.

Grigsby I provided appellant with an opportunity, albeit limited, to establish that the Robert Leger Well No. 1 had been treated as a separate property prior to the state's reclassification, but appellant was unable to do this on remand.

For the foregoing reasons, the decision appealed from is AFFIRMED.